# The Solicitors' Journal

Vol. 94 April 15, 1950 No. 15

## CURRENT TOPICS

### New Statutory Instruments

Three statutory instruments issued this week are of some general importance to solicitors. First, the Lands Tribunal (War Damage Appeals Jurisdiction) Order, 1950 (S.I. 1950 No. 513), which comes into operation on the 17th April, transfers from the War Damage Valuation Appeals Panel to the Lands Tribunal the jurisdiction of the Panel under the War Damage (Valuation Appeals) Act, 1945. The order preserves the Panel's jurisdiction in cases part-heard before that date, and lays down detailed rules of procedure for appeals and references to the Lands Tribunal. Secondly the Justices of the Peace Act, 1949 (Date of Commencement) Order, 1950 (S.I. 1950 No. 517) appoints 1st June next as the date on which a large number of provisions of the Justices of the Peace Act are to come into force, including ss. 1–7 (s. 7, it should be observed, is the new provision governing the rights of solicitor-justices to practise, and supersedes s. 54 of the Solicitors Act, 1932), s. 14, s. 20 (this section prescribes the qualifications of justices' clerks and provides for the admission as solicitors of unarticled assistant clerks who comply with certain conditions), s. 29 (in part), ss. 30–35, 37, 39–41, and certain ancillary provisions. The order also fixes 1st January, 1951, for the coming into force of s. 13 of the Act, which relates to the size and chairmanship of the bench. Thirdly, the Plant and Machinery (Valuation for Rating) (Amendment) Rules, 1950 (S.I. 1950 No. 565), amend the important rules of 1927 to bring them into conformity with the changes in rating valuation machinery effected by the Local Government Act, 1948.

### Chancery Division Witness Actions: New Procedure

MEMBERS are invited, in the current issue of the *Law Society's Gazette*, to send details to the Council of The Law Society if their applications under the new practice direction in the Chancery Division are refused. The Council express their regret that the direction departs from the recommendations in the Interim Report of the Supreme Court Committee on Practice and Procedure, and from the evidence of The Law Society and the Bar Council to that committee. The direction (which is set out *ante*, p. 160) states that in the ordinary course witness actions in the Chancery Division after Easter will appear in one or other of the witness lists twelve days after being set down for trial, and, subject to what is provided below, will come on for hearing in the order in which they appear for trial. On and after 15th March, 1950, applications may be made by counsel for the fixing of a date for the hearing of an action appearing in any of the witness lists. Applications should be made to the judge in charge of the list. The Council express their confidence that the profession will do their utmost to make the new procedure succeed.

### Cross-examination as to Credit

"IT is one thing to cross-examine a witness as to credit," said the Lord Chief Justice in a case before the Court of Criminal Appeal on 3rd April (*The Times*, 5th April), "in

## *CONTENTS*

which case counsel is bound by the answers of the witness, but another to make charges by way of defence against the police or any other people. It is improper to make such charges without calling the client to substantiate them." "Again," his lordship continued, "it is one thing to examine a witness temperately with regard to his credit, but quite another thing to cross-examine him with no material to support allegations against him. It is entirely wrong to make suggestions—as in the present case—that the police threatened to beat a man up unless he made a confession, and then not substantiate them." The court hoped that counsel would refrain from making such charges if they had no evidence with which to substantiate them.

### Preparation of Briefs

IT is undesirable, say the Council of The Law Society in a note in the current issue of the *Law Society's Gazette*, that briefs should be drawn except by an instructing solicitor. It seems that in a recent taxation briefs were produced which had been prepared in counsel's chambers by his clerk. The delivery of a brief, the date of the delivery of a brief, and the fee marked on the brief are all important factors in taxation, state the Council. It is difficult to imagine any emergency which would justify the drawing of instructions, or even the preparing of a back sheet, by any person other than the instructing solicitor, even where no question of subsequent taxation can arise, and it is to be hoped that both counsel and instructing solicitor will see that their clerks conform to this advice of The Law Society. In cases where on careful consideration they feel that an emergency has arisen, it would be useful, we respectfully submit, to communicate the circumstances to The Law Society so as to obtain an elucidatory ruling.

### Recent Decisions

In *Whitty* v. *Scott-Russell*, on 3rd April (*The Times*, 4th April), the Court of Appeal (BUCKNILL and ASQUITH, L.JJ., and ROXBURGH, J.) held that, where a house, and a cottage semi-detached from the house (there being no internal communication between them), and a garden occupying considerably more space than the site of the house were let at £75 per annum in one lease in which the premises were described as "the dwelling-house and cottage with the garden and land thereto belonging," and the tenant covenanted therein "to use the premises as and for a private dwelling-house only," the house and cottage constituted one house let as a separate dwelling and the tenant was protected by the Rent Restrictions Acts.

In *R.* v. *Middlesex County Quarter Sessions; ex parte Director of Public Prosecutions*, on 4th April (*The Times*, 5th April), a Divisional Court (The LORD CHIEF JUSTICE and HUMPHREYS and JONES, JJ.) held that, where magistrates convicted a person of an offence under the Prevention of Corruption Acts, 1909 to 1916, and purported to commit him to quarter sessions for sentence under s. 29 of the Criminal Justice Act, 1948, quarter sessions rightly refused to sentence the accused because the person who had been convicted could not have been tried at quarter sessions on indictment, and quarter sessions therefore had no jurisdiction to sentence him.

# LOCAL LAND CHARGES AND ADDITIONAL ENQUIRIES—II

THE first article (p. 221, *ante*) contained an outline of the main contents of Pts. I, II and III of local land charges registers. Before continuing further some general comments on the form of registers may be of interest.

There is a good deal of confusion of thought regarding the contents of the register of local land charges and, particularly, regarding the contents of Pt. III (*c*), because the effects of the statutes and of the rules are not clearly distinguished. The matters which are local land charges, and registrable as such, are defined by the Land Charges Act, 1925, as subsequently amended and extended. The various regulations state the part of the register in which the various matters should be entered. For instance, the Local Land Charges Rules, 1934, r. 5 (*c*), states that Pt. III is the part "relating to prohibitions of or restrictions on the user or mode of user of land or buildings which are planning charges." Rule 15 (4) of the 1934 rules requires that official certificates of search shall be in the form set out in Sched. I to those rules. That form has subsequently been amended by other rules, and it is not proposed to consider its contents, as they are well known. The important point to note is that the headings to Pt. III (*c*) of this form contain references to the seven matters arising under various sections of the Town and Country Planning Act, 1947, which were specified at the end of the first article in this series. The fact that these are mentioned in the headings does not itself make them registrable, but is nothing more than an expression of the opinion of the Lord Chancellor, who made the rules, that such matters were made registrable by statute and a direction as to how they should be entered on a search certificate. There is no doubt but that these various matters are registrable, but it is not correct to assume that they are the only entries which should be made. There is a separate column on the form of search certificate for any other entries required to be made and, for reasons given at p. 222, *ante*, conditional planning permissions will be noted in it.

Prohibitions and restrictions which are *not* planning charges are contained in Pt. IV of the register. There are so many different types of charge that a complete list cannot be given; examples are conditions imposed on the passing of plans of buildings to be constructed of short-lived materials (Public Health Act, 1936, s. 53), and conditions restricting rents and selling prices enforceable under the Building Materials and Housing Act, 1945, s. 7. These entries disclose a large number of potential liabilities but they do not state all matters in respect of which the local authority may take action adversely affecting the interest of a purchaser. For instance, a statutory nuisance notice served by the local authority under the Public Health Act, 1936, s. 93, is not registrable. (On the other hand, if default is made in complying with such a notice and the local authority incur expense in abating it, a charge in respect of the cost may be registered and will appear in Pt. II.) The Law Society forms of additional enquiries go some way towards filling the gap by a number of questions relating to possible liabilities. Thus, one question on all the forms asks whether there are any outstanding notices issued by the council other than those shown on the official certificate of search. This is a very wide enquiry indeed. Another, more limited, question relates to permissions for discharge of trade effluents into sewers, and agreements under the Public Health (Drainage of Trade Premises) Act, 1937.

Parts V to X of the register deal with more detailed subjects and do not normally cause difficulty. Their contents are as follows: Pt. V, charges of county councils in maintaining

certain improvements over fenland; Pt. VI, compulsory purchase orders under expedited procedure (as to which, see below); Pt. VII, orders designating sites for new towns and compulsory purchase orders by development corporations; Pt. VIII, restrictions arising out of orders of the Minister of Civil Aviation under the Civil Aviation Act, 1949; Pt. IX, supervision orders made under the Agriculture Act, 1947; Pt. X, lists of buildings of special architectural or historic interest compiled by the Minister under the Town and Country Planning Act, 1947, s. 30.

Many solicitors are in doubt as to when, if at all, compulsory purchase orders are registered. In general there is no rule requiring registration of such an order, although it seems that after the serving of a notice to treat and the fixing of the price the order should be registered as an estate contract. The compulsory purchase orders which are registrable in Pt. VI are the special orders made under the Town and Country Planning Act, 1947, s. 39, which contain a direction applying expedited procedure. The importance of the registration of these particular orders lies in the fact that a notice to treat is deemed to have been served at the date when registration is effected. Compulsory purchase orders made under the Town and Country Planning Act, 1944, are also registrable in this part, but such orders are not likely to be of great importance in the future. Orders designating the site of a proposed new town appear in Pt. VII. Thus, it will be appreciated that most orders, for instance the ones frequently obtained under powers in the Housing Act, 1936, or the Education Act, 1944, are not registrable. Once more a gap is filled by the enquiry on The Law Society's forms as to whether any order has been made (whether or not confirmed by the appropriate Minister) or whether any resolution has been passed for compulsory purchase.

So far these notes have dealt with the various parts of the register and with some of the additional enquiries which explain or expand the information given on an official certificate of search. There are, however, a number of miscellaneous enquiries on The Law Society forms about matters of interest to a purchaser which do not in any way concern local land charges. For instance, county borough and borough or district councils (i.e., the appropriate sanitary authorities) are asked whether there is a public sewer "available to serve the property." It is not always easy to say when a sewer can be regarded as available to serve land not connected to it, and in most cases the property is already connected with a sewer. No doubt there are occasions, however, in areas in course of development when the enquiry serves a useful purpose. It is significant that a note on the form explains that the question will not be answered if it would be necessary to inspect the property. A further question asks whether there is any enactment, statutory scheme or order relating to combined drains, or any agreement within the meaning of the Public Health Act, 1936, s. 24. This complicated subject requires some explanation. The general rule before 1937 was that a pipe which carried drainage from more than one building was a sewer which vested in the local authority and was maintainable by that authority even if it lay in private land (Public Health Act, 1875, s. 4; *Acton Local Board* v. *Batten* (1884), 28 Ch. D. 283). This rule often threw a burden on the local authority which was unreasonable, particularly as the authority had no control over the construction of such sewers. Although the Public Health Acts Amendment Act, 1890, s. 19, provided that many such pipes should be considered as "single private drains" repairable at the cost of the owner, the position remained unsatisfactory. Consequently, local authorities often inserted provisions in local Acts throwing liability for what became known as "combined drains" on to the owners, or made "combined drainage agreements" when building was carried out, providing that liability for joint drains (which, being joint, became technically "sewers" and repairable by the authority) should fall on the owners. The Public Health Act, 1936, provided that in the future any sewer which, under the 1875 Act, was vested in the local authority, or which would have been so vested but for a provision relating to combined drainage, should be a "public sewer" vested in the local authority. In the case of some such sewers, however, the cost of maintenance may be recovered from the owners of premises served. Recovery from owners may be made, *inter alia*, where, before the 1936 Act, by virtue of provisions of an enactment, statutory scheme or order relating to combined drains or an agreement as to combined drainage, expenses of maintenance could be recovered from the owners (Public Health Act, 1936, s. 24). The position is confusing and it is not usually necessary to consider it in detail on the purchase of property. Nevertheless, the above, very brief, explanation may serve to show that liability for maintenance of a sewer in the future may depend on the provisions of a statute or agreement as to combined drainage, and so the information given in answer to the enquiry may be very useful.

There is an enquiry to county borough and to borough or district councils as to whether the property has been registered as decontrolled; a note draws attention to the fact that the question may still be material in ascertaining the correct standard rent.

J. G. S.

***Costs***

# TAXATION—II

We were considering in our last article the practical steps to be taken with regard to the taxation of costs, and we reached the stage where the bill of costs had been lodged and an appointment to tax had been given by the taxing master.

The next step is, of course, to attend the taxation before the master and defend the bill that we have lodged, if we are the party lodging the bill, or oppose the bill if we are the opposite party. Little can be said here that can be of assistance, for the person who attends the taxation must have (*a*) a good knowledge of costs, and (*b*) a clear understanding of the case involved and the details of the work done. The best advice that can be offered is that the whole of the pleadings, proofs of evidence and counsel's brief should be read, and the person attending the taxation on behalf of the successful party should acquaint himself with counsel's advice on evidence, for, as we have noticed in a former article, it is the advice on evidence rather than what happened at the trial that the taxing master will take into account in determining the amount to be allowed for witnesses (see *Heffernan* v. *Vaughan* (1884), 18 Ir. L.T. 38); and, as a corollary to this proposition, it is only the work done in obtaining the evidence of the witnesses who counsel has advised should be called, or whose evidence counsel suggests should be investigated, that will normally be allowed on a party-and-party taxation.

The person who attends the taxation of costs should look particularly at the discretionary items in the bill, that is, those items in, say, a High Court bill which are not provided for in Appendix N of the Rules of the Supreme Court, or

which, if they are so provided for, are being charged at more than the minimum allowed by the scale in Appendix N. In either case it will have to be shown conclusively that the item claimed is within the ambit of R.S.C., Ord. 65, r. 27 (29), as being necessary or proper for the attainment of justice or for defending the rights of the party.

It is perhaps hardly necessary to add that the person attending the taxation to support the bill of costs should bear clearly in mind the cardinal fact that the taxing master (*a*) will have an intimate knowledge of the Rules of the Supreme Court, particularly of those relating to costs, and (*b*) will have read most carefully the whole of the papers lodged with the bill of costs, with the result that preparation must be made to supply verbal amplification of what is included in the documents in the case, and to bring forward facts and figures to show that something more than the minimum allowance under Appendix N is warranted in a particular case.

It must be remembered also that the taxing master's discretion, so far as the *quantum* of an allowance is concerned, is entirely unfettered (see Ord. 65, r. 27 (38)), with the result that it is imperative that every effort be made to convince the taxing master of the justice of an item, in so far as the amount charged in respect of that item is concerned. The taxing master's decision on this point will rarely be upset even by a judge, and then only if it is apparent that he has not exercised his discretion fairly and reasonably. Indeed, we have it on no less an authority than Cozens-Hardy, M.R., in the case of *Re Ogilvie* [1910] P. 243, that, so far as some items are concerned at any rate, there could be no tribunal more unfitted to determine the amount of an allowance than a judge of the High Court. This may be thought to be rather strong language, but the fact remains that for a great many years judges have declined to interfere with the discretion of the taxing masters so far as the amount of an allowance is concerned, where that discretion has been properly exercised.

It is only when a question of law is involved, or where the taxing master has misdirected himself or has acted on a wrong principle, that the court will interfere with his decision; "... the taxing master is the person whose duty it is to decide questions of *quantum* and it is not right for the judge to interfere in such a matter" (see *Re Ogilvie, supra*). "This is a mere question of *quantum*. I cannot deal with it," said Lord Langdale, M.R., in *A.-G.* v. *Lord Carrington* (1843), 6 Beav. 454.

It would appear at times that the court has, in fact, interfered on a question of *quantum*, as, for instance, in the case of *Smith* v. *Buller* (1875), L.R. 19 Eq. 473, where the amount of the fees allowed to an expert witness was reduced; but, in fact, it will be found that there was a principle involved here as well as a question of amount, and the prime reason for the reduction in the fees in that case was that the payment was regarded by the court as a luxury, whereas all that the successful party is entitled to is the necessary costs of conducting the litigation, and any costs incurred in conducting that litigation more conveniently for the party incurring them must be disallowed.

The recent case of *Sunnucks* v. *Smith* [1950] W.N. 130 provides an instance where the court interfered with the taxing master's decision on a question of principle, although at first glance it might be thought that it is only a question of amount that is involved there. The case turned on the reduction of counsel's brief fees on appeal below the fee which had been allowed in the lower court, and the taxing master had given as his reasons for reducing the fee charged on appeal the fact that counsel was fully conversant with the facts and was put to very little extra trouble in taking the case before the Court of Appeal. He also appeared to have been influenced by the fact that the plaintiff had been unsuccessful in the lower court and that there was no expectation that she would win in the Court of Appeal. Vaisey, J., made it clear that if the only reason which had influenced the taxing master in reducing the fee was that he did not consider that the work which counsel did in the Court of Appeal merited more than the amount which he was prepared to allow him, then he, the learned judge, would not have interfered with the taxing master's decision. The latter, however, had proceeded on the principle that because the plaintiff had been unsuccessful in the lower court, and because her case appeared to be hopeless so far as an appeal to the Court of Appeal was concerned, then counsel was not entitled to the same fee as he had had in the lower court. This, Vaisey, J., held, was a false premise, since, if the plaintiff's case appeared to be hopeless, then it was all the more essential for counsel to be additionally careful and to guard against surprise in the Court of Appeal, and he held, therefore, that there was no justification, so far as was shown, for the fee in the Court of Appeal to be reduced.

The case demonstrates the distinction between a mere question of *quantum* and a question of principle. The learned judge made it clear that if only the former had been involved then he would have been reluctant to interfere. The case is also interesting in that it establishes the principle that counsel should normally be allowed the same fees in the Court of Appeal as they receive in the lower court, unless it can be shown conclusively that the work in the Court of Appeal is less than in the lower court, as, for instance, where the issues are greatly limited. The proposition that counsel should receive a lower fee because he has already considered the facts for the purpose of the action in the lower court or because in the opinion of the instructing solicitor the opponent's case is hopeless will not constitute sufficient grounds for reducing the amount of his fee in the Court of Appeal.

Enough has been said to indicate the principles upon which the parties taxing a bill of costs must proceed before the taxing master. So far as the party whose bill is being taxed is concerned, he must be prepared to show conclusively that the work for which he is claiming remuneration from the opposite party was necessary and proper for the attainment of justice, that it was not occasioned by over-caution or undertaken for the convenience of his client, and that, so far as the evidence is concerned, he acted throughout on the advice of counsel. He must convince the taxing master of the fairness and justice of the amounts claimed in respect of the discretionary items, for there is no appeal to any other tribunal from the taxing master's decision, so far as a mere question of amount is concerned.

The opposing solicitor, in attacking any item in the bill, must be prepared to show that the work undertaken was unnecessary or extravagant, or that it was not part of the work in respect of which costs were awarded to his opponent by the terms of the judgment or order; and he will be careful to investigate the work done in connection with obtaining evidence on any point in the proceedings which was subsequently abandoned.

On completion of the taxation the left-hand column of the bill of costs, showing the amounts taxed off, must be cast, the other casts checked and the totals of each page carried to the summary at the end of the bill. The bill, if in the Chancery or King's Bench Division, is then lodged in the Taxing Office and the taxing fee of 1s. for each £2 paid by stamps impressed on the bill. In addition 14s. will be paid for the

taxing certificate. The latter is drawn in the taxing master's chambers and is signed by the master and filed in the Central Office, whence an office copy may be obtained by the solicitor whose bill has been taxed. The original bill, with the taxing master's certificate, is filed in the Central Office.

In sitting master cases, that is, in the case of short and urgent taxations, to which we referred in our last article, there is no certificate, but a form of allocatur will be issued. The latter is a form completed by the solicitor, signed in the master's chambers and filed in the writ department. There is no fee payable for an allocatur.

The procedure is somewhat different in the Admiralty Registry. There the total amount of the bill is agreed by the respective solicitors, after it has been taxed by the registrar, and they will sign a certificate at the end of the bill to the effect that it has been agreed as taxed at a total of so much. The bill is then lodged in the registry and the taxing fee paid. If the parties desire an allocatur then it will be prepared in the registry and signed by the registrar.

In our next article we shall deal with objections to and review of taxations of bills of costs.

J. L. R. R.

## *A Conveyancer's Diary*

# "BENEFICIAL INTEREST IN REAL ESTATE"

THE code for the distribution of the residuary estate of persons dying intestate contained in Pt. IV of the Administration of Estates Act, 1925, is subject to an exception. This exception appears in s. 51 (2), which provides that the foregoing provisions (i.e., the rules ordinarily applicable for the distribution of intestates' estates) shall not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic, living and of full age on the 1st January, 1926, and unable by reason of his incapacity to make a will, who thereafter dies intestate in respect of such interest without regaining his testamentary capacity, was entitled at his death. Any such beneficial interest, it is further provided, not being an interest ceasing on the lunatic's death, shall (without prejudice to any will of the deceased) devolve in accordance with the general law in force before 1926 applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case; that is to say, in a case to which the provision applies the real estate in which the lunatic has a beneficial interest goes to his heir at law, ascertained in accordance with the pre-1926 rules.

The question what is a beneficial interest in real estate for the purposes of this provision does not appear, on the face of it, to raise serious difficulties. A beneficial interest is an interest to which a person is entitled beneficially and not in trust for some other person, and the expression "real estate" is defined by ss. 55 (1) (xix), 1 (1) and 3 (1) of the Administration of Estates Act, 1925, to mean, for the present purposes (that is, when the exceptions made by s. 51 (3) are taken into account), land in possession, remainder or reversion and every interest in or over land to which the lunatic was entitled at the time of his death, including real estate held by way of mortgage or security, but not money to arise under a trust for sale of land nor money secured or charged on land. But in fact, because of the changes in other branches of the land law effected by the 1925 legislation, notably various provisions producing a statutory conversion of realty, the construction of the phrase "beneficial interest in real estate" has come before the court on two occasions, and its meaning has been the subject of much argument.

In *Re Donkin* [1948] Ch. 74, the intestate, who had been of unsound mind since some date before 1926, died in 1934. The intestate had a brother, who died in 1928, also intestate but not of unsound mind, leaving her his sole next of kin, and entitled, at the time of his death, to certain freehold property. As the intestate was of unsound mind on the 1st January, 1926, s. 51 (2) of the Act undoubtedly applied to her, and the question therefore arose whether her right to or over the freeholds comprised in her brother's estate was a "beneficial interest in real estate" and so went, together with the realty comprised in her own estate, to her heir at law, or whether her right in this respect, not being such an interest, was not affected by s. 51 (2) and so devolved upon the statutory next of kin ascertained in accordance with the post-1925 rules for the distribution of the effects and estates of intestates.

Roxburgh, J., held that the intestate's interest in her brother's freeholds was not a "beneficial interest in real estate" within the meaning of s. 51 (2) for the following reasons: (i) her right in this respect was a right to have her brother's residuary estate distributed in the manner provided by s. 46 of the Administration of Estates Act, 1925; (ii) a "residuary estate" for this purpose is arrived at by subjecting the intestate's estate, real and personal, to a trust for sale (s. 33 (1)) and paying out of the proceeds of such sale the intestate's debts, funeral expenses, etc.; (iii) the intestate's interest in this respect was, therefore, an interest in the proceeds of a trust for sale of land, and this could not be described as a "beneficial interest in real estate." In the opinion of Roxburgh, J., a beneficial interest, to be caught by the provisions of s. 51 (2), had to be such an interest as would, under the pre-1926 law regulating the devolution of property on intestacy, have devolved in accordance with the law then applicable to freehold land, i.e., upon the heir at law: an interest in the proceeds of a trust for sale of land would not have so devolved, and that concluded the question.

More recently there has been the decision of the Court of Appeal in *Re Bradshaw*, *ante*, p. 162, overruling the decision of Danckwerts, J. (reported at (1949), 93 SOL. J. 774). Here the facts were somewhat different. On the death of her father in 1906 the intestate, who became of unsound mind in 1912 and continued of unsound mind until her death, intestate, in 1948, became entitled to an undivided share in real estate which, under the pre-1926 law, would have devolved on her intestacy upon her heir at law. By reason of the 1925 legislation this undivided share was converted, on the 1st January, 1926, into an interest in the proceeds of sale of land, and Danckwerts, J., followed *Re Donkin*, *supra*, and held that the intestate's interest at the date of her death, having been converted into personalty, was not a "beneficial interest in real estate" for the purposes of s. 51 (2), and passed accordingly to her next of kin.

The Court of Appeal, by a majority, reversed this decision. Sir Raymond Evershed, M.R., with whose judgment Somervell, L.J., concurred, tested the applicability of s. 51 (2) to any given case in this way: beneficial interests, to come within this exception, had to possess three characteristics—(i) they must first have existed and belonged to the lunatic on the 1st January, 1926; (ii) they must also have existed and belonged to the lunatic at the time of his or her death; and (iii) the beneficial interests must be such that on, and

immediately before, the 1st January, 1926, they would have devolved as real property and gone to the heir. He found himself able to distinguish *Re Donkin, supra,* on the ground that in the present case the lunatic's interest had been in existence on the 1st January, 1926, whereas in the earlier case the interest had come into existence for the first time only after that date (i.e., on the death of the lunatic's brother in 1928). On this view, *Re Donkin* had been rightly decided because the first requirement had not been satisfied in that case. It will be seen that the grounds on which Sir Raymond Evershed upheld the earlier decision are somewhat different from those on which the case had been decided by Roxburgh, J.

Jenkins, L.J., dissented from this view, on the ground, shortly stated, that the " foregoing provisions " referred to in s. 51 (2) were a reference to the part of the Administration of Estates Act, 1925, dealing with the distribution of intestates' effects and did not extend to the provision which effected a statutory conversion of the undivided share to which the lunatic was entitled, that provision being found not among the " foregoing provisions," but in the Law of Property Act, 1925. He also drew attention to the fact that the statutory trust for sale and an express trust for sale were indistinguishable for the purpose under consideration, and if the proceeds arising under a statutory trust for sale of land were a beneficial interest in real estate, by parity of reasoning an interest in the proceeds of sale under an express trust for sale would be an interest in real estate. Such a result is certainly odd, and, it might have been added, contrary to the spirit (if not the exact letter) of s. 3 (1) (ii) of the Act (which was not apparently brought to the notice of the court), whereby money to arise under a trust for sale of land is expressly excluded from the definition of " real estate." There is room for reflection here.

" A B C "

## *Landlord and Tenant Notebook*

# SUB-TENANT OF UNPROTECTED TENANT

*Knightsbridge Estates Trust, Ltd.* v. *Deeley* [1950] 1 All E.R. 577 (C.A.), reads very much like an exercise in logic, the major premise in the syllogism propounded being : " a thing cannot die if it has never been born." The " ineluctable conclusion " drawn from this and the minor premise was, according to Asquith, L.J. (whose words I have quoted), " almost certainly unintended " and " unjust " ; this characterisation was, I may say, not agreed to by Roxburgh, J.

The action was for possession and the defendant was the sub-tenant of a dwelling-house in London. The head lease, granted in 1931 for a term of fourteen years, reserved an annual rent of £20. This was less than two-thirds of the rateable value, and presumably that value was not over £100 on 6th April, 1939, so that the Rent, etc., Restrictions Act, 1939, applied to the dwelling-house when it was passed and when the lease expired in 1947. Applied to the dwelling-house, but not to the tenancy : Increase of Rent, etc., Restrictions Act, 1920, s. 12 (7), of which more later. In the meantime an assignee of the lease had sub-let the premises to the defendant at a rent which rose to £75 a year, and he laid claim to the protection afforded by s. 15 (3) of the last-mentioned statute : " Where the interest of a tenant of a dwelling-house to which this Act applies is determined . . . any sub-tenant to whom the premises . . . have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

But s. 12 (7) runs (italics mine) : " Where the rent payable in respect of any *tenancy* of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or *tenancy* . . . and this Act shall apply in respect of such dwelling-house *as if no such tenancy existed or ever had existed.*"

The chain of reasoning in the judgment, which upheld a decision in the plaintiffs' favour, may be said to be constituted as follows : (i) The interest of a tenant is his tenancy ; (ii) The defendant's right to become the plaintiffs' tenant depended on the determination of another tenancy ; (iii) Before a tenancy can determine, it must exist ; (iv) In this case, no such tenancy existed or ever had existed ; (v) Therefore the defendant had no right to become the plaintiffs' tenant.

The object of s. 12 (7) was, according to Asquith, L.J., concerned with rent control itself rather than with security of tenure. It ensured, on the one hand, that some abnormally low rent should not become the standard rent ; on the other hand, that the sub-tenant paying a commercial rack-rent should be able to treat the rent at which he held as the standard rent, the head rent being ignored in fixing that standard rent.

It may be remembered that when s. 12 (7) does not apply and there are a head tenancy and sub-tenancy at different rents, that paid by the occupier on the relevant date counts for standard rent determination purposes, though it may be the lower (*Glossop* v. *Ashley* [1922] 1 K.B. 1 (C.A.)). This (from the freeholder's viewpoint) was one of those " hard cases," the discrepancy being ascribable to the facts that the premises were licensed (since decontrolled by the 1933 Act) and that the sub-tenancy contained a tied-house clause ; but Asquith, L.J.'s exposition reminds us that the primary object of the Rent Restrictions Acts is, after all, rent restriction, the provisions for security of tenure being essentially ancillary provisions. Dealing later with an argument that a judgment in the landlords' favour would have terrible consequences, because many long leases in London would soon be falling in and the ground landlords would be able both to get rid of the occupying sub-tenants and to let the houses at any rents they liked, Asquith, L.J., said that the second consequence (incidentally, the existence of the Landlord and Tenant (Rent Control) Act, 1949, on which another argument appears to have been based, appears to have been forgotten here) would not follow ; if the landlords did eject the sub-tenants, the rents they had paid would still be the standard rents. One might add that town planning would do much to prevent ground landlords from putting the houses to other uses.

The learned lord justice's view that the result was unintended and unjust was, I think, based on the consideration that though the head rent was not a ground rent in the strict sense of that expression (in *Stewart* v. *Alliston* (1815), 1 Mer. 26, Lord Eldon said that the expression was used generally to mean a rent less than the rack-rent, but in *Bartlett* v. *Salmon* (1855), 6 De G. M. & G. 33, Lord Cranworth said that strictly speaking it meant the sum paid by the owner or builder of houses for the use of the land on which the houses

were built) no distinction ought to be drawn between a sub-tenant whose immediate landlord held at a rack-rent and one whose immediate landlord paid a "ground rent." Asquith, L.J., considered that s. 12 (7) was a good thing itself, referring on this point to observations made by Scrutton, L.J., in *Brookes* v. *Liffen* [1928] 2 K.B. 347 (C.A.) (see "Ground Rents and Control" in the "Notebook" for 15th October last, 93 SOL. J. 643), but that the effect of the impact of the subsection on s. 15 (3) was most unreasonable. It may well be that Roxburgh, J., dissociated himself with this opinion (reserving his view) because, to one conscious of the Chancery approach to a long lease as just a "sale *pro tanto*," it might not seem right that a reversioner whose ancestor had received a large sum for the lease but who himself had, during its currency, been entitled to no more than an annual peppercorn (if demanded) should find that his pitch had been queered by the operations of the builder who developed the site and of persons deriving title through him. It may well seem more reasonable that he should be in the position of the plaintiff in the recent case of *Cow* v. *Casey* [1949] 1 K.B. 474 (C.A.), in which a tenant who took (from the freeholder) part of a house which was, by reason of its rateable value, outside the Acts was held to be unprotected when his tenancy expired. In *Knightsbridge Estates Trust, Ltd.* v. *Deeley*, a subtle argument in favour of the defendant was actually founded upon this decision, which would appear rather to support the plaintiffs' case; at all events when the cold logical test adopted in the judgment is applied. (For a discussion of *Cow* v. *Casey*, and suggestions as to how a tenant in that position might possibly protect himself, see 93 SOL. J. 82.)

The new decision is another reminder of the important difference between "a dwelling-house to which" and "a tenancy to which" the Acts apply, emphasised, e.g., in *Stone (J. & F.) Lighting & Radio Co., Ltd.* v. *Levitt* [1947] A.C. 209; incidentally a difference of which, it was suggested in the "Notebook" on 8th October last, some landlords affected by the Landlord and Tenant (Rent Control) Act, 1949, are able to take advantage.

R. B.

# HERE AND THERE

## MEWED UP

THE cat with nine tails has been holding almost undisputed possession of the field of controversy, legal and lay, for so many weeks now, that it made a startling and pleasant change when the cat with nine lives (pretty pussy or *felis domestica*) raised its plaintive voice in King's Bench Court 8 where Sellers, J., was trying a case. We have all been aware from our earliest years of the basic constitutional principle that a cat may look at a king and it surely follows *a fortiori* that a cat may mew at one of His Majesty's judges, provided, of course, that it is no impertinent cat-call, that the feline can show just cause and that its conduct is proper judged by the standard of the ordinary reasonable cat. That this was such a case the court evidently entertained no doubt. The learned judge, quite certainly correctly, understood it to be moving *ex parte* for a writ of habeas corpus. The urgency of its expressions clearly indicated that it had got its body into a situation of false imprisonment or straitened circumstances in which immediate relief was a matter of urgency. Even such "a long and melancholy mew" gave Cowper's cat imprisoned in the drawer. A judge less humane might have declined to entertain the application with a formal "I cannot see you" or some other technical ruling calculated to intimidate a litigant in person. But Sellers, J., directed an immediate search and, to leave a clear field for the rescue, adjourned to Court No. 7 next door.

## CAT HUNT

EVERY stranger who has strayed beyond the ecclesiastical glories of the Central Hall, and even *habitués* who have ventured off the beaten track of the court corridors and the way to the Bear Garden, know that there is not another building in London (except perhaps the Houses of Parliament) that can beat the Royal Courts of Justice for labyrinthine ways and passages that lead to nothing. Then add to these ventilation chambers, air ducts and odd unexpected spaces behind the panelling and you have the architectural equivalent of the Annual Practice. The most unaccountable things can happen. In Lord Hewart's time the Lord Chief Justice's Court was once for a while haunted by smells of cooking. His lordship protested angrily, saying that the court might well be described as a branch of the Office of Works with cookhouse annexed. The official catering establishment pleaded "Not Guilty" and proved an alibi. All installations were remote from the nuisance and the offending odours corresponded to nothing on their bill of fare. In the circumstances it remained a mystery by what devious channels and from what unknown origin smells of bacon and eggs, rabbit and pork intruded on the Lord Chief Justice. In a building where a whole unauthorised kitchen can operate untraced, even with so strong a scent to guide, cat hunting by ear alone is rather more difficult than locating a silted-over galleon at Tobermory. That night, on Office of Works orders, a search party of nine (on time-and-a-quarter for two hours and time-and-a-half thereafter) combed all possible and impossible places. The suspected disturber of the courts is said to be a cat known as Tommy Traddles, attached to the Law Courts workers' canteen, who after a prolonged absence returned to duty "pretty wild and very dirty" as if he had left one of his nine lives in an extremely tight corner, where there was no room to swing a cat.

## NOT BAREFACED

IT is reported from Jutland that the Danish police are seeking to unravel the tangled problem of an obstinately obstructive moustache, a particularly fine, flowing specimen behind which, screened as by a mask, lurk features which they would very much like to see face to face, plain and unadorned. This hirsute curtain baffles them in the investigation of the responsibility for an offence committed at a time when it was far less luxuriant and impenetrable. So far there is deadlock in the solution of the problem of identification. Strong as Samson in his hair, the owner sits pretty, if that be the correct phrase. In the circumstances the restraint of the Danish police is remarkably civilised in a world where the State in most places regards it as a point of honour to have a whole pack of legislative aces up its sleeves to enable it to do whatever the official in the office or bureau deems convenient. The French, I am sorry to say, would cut the Gordian knot. In fact a few years ago, when this precise problem arose in a court of law, they did. An alleged confidence trickster, who had posed as an English knight, came into court behind a newly acquired beard of great luxuriance. The difficulty of identification was at once apparent. The judge announced that he had shaving tackle in his room; the usher turned out to be a skilled barber and before you could say "writ of prohibition" the accused was barefaced and unmistakable.

RICHARD ROE.

---

The King has appointed Mr. G. RAYMOND HINCHCLIFFE, K.C., to be Recorder of Leeds in succession to the late Mr. Paley Scott.

Mr. E. L. STURDY has been appointed deputy town clerk of St. Marylebone.

# NOTES OF CASES

## COURT OF APPEAL

### ADULTERY: CONNIVANCE

**Manning *v.* Manning and Fellows**
**Fellows *v.* Fellows**

Bucknill and Singleton, L.JJ., and Hodson, J.
15th February, 1950

Appeals from Willmer, J. ([1949] W.N. 291).

Mrs. Fellows, the petitioner in the second petition, alleged that she overheard her husband boast that he had seduced Mrs. Manning, the wife of the petitioner in the first petition. Manning, the husband-petitioner in the first petition, had his suspicions aroused a month later. Both petitioners consulted a solicitor, and thereafter, while remaining on outwardly friendly terms with their spouses, by various manœuvres sought evidence for divorce. Manning installed a microphone in his sitting room, hidden in a piano, with wires leading to the garage, and evidence was given of two occasions when he listened to conversations between the two respondents. Mrs. Fellows was with him on the first occasion, but when they went into the house they found no direct evidence of adultery, and they pretended that they had no suspicions. On the second occasion, after listening to a conversation, which the court described as indecent, Manning and two brother police officers entered the house and caught the respondents in the act of adultery. Willmer, J., dismissed both petitions on the ground of connivance. He found that the petitioners, though innocent victims at the outset, had, after becoming suspicious, made up their minds that they wanted their freedom and to that end, with their eyes open, had acquiesced in and assented to the continued association of their spouses in the hope and with the intention of obtaining evidence of adultery against them. The petitioners appealed.

BUCKNILL, L.J., said that Willmer, J., had based himself on *Gipps* v. *Gipps* (1864), 11 H.L.Cas. 1, where Lord Westbury, L.C., at p. 14, had referred to a wilful abstaining from taking any steps to prevent the adulterous intercourse which the complaining spouse cannot but believe is likely to occur. The principle underlying the doctrine of connivance was laid down by Sir Cresswell Cresswell in *Glennie* v. *Glennie* (1862), 32 L.J.P.M. & A. 17, at p. 20: the party conniving need not be an accessory before the fact; it sufficed that he should be cognisant that adultery would follow from transactions that he approved of and consented to. Section 178 (2) of the Judicature Act, 1925, showed that there were three degrees of blameworthy conduct in these matters: at the one end of the scale the petitioner must not be an accessory, that was, an active promoter. At the other end was conduct conducing, which might be mere slackness contributing to the adultery. Between those extremes lay the undefined area of connivance—a question of fact for each case. Willmer, J., was entitled to find that the conduct here came within Lord Westbury's definition in *Gipps* v. *Gipps, supra*, and the appeals failed.

SINGLETON, L.J., and HODSON, J., gave concurring judgments. Appeals dismissed.

APPEARANCES: *Henry Burton* (*Field, Roscoe & Co.*, for *Frank Leigh & Johnson*, Manchester); *T. Dewar* (*T. C. Boyes*, for *Frank Douglas, The Law Society Services Divorce Department*, Manchester); *K. Burke* (*Hewitt, Woollacott & Chown*, for *Heath, Sons & Broome*, Manchester).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

### WORKMEN'S COMPENSATION: TRANSITIONAL PERIOD

**Harris *v.* Rotol, Ltd.**

Cohen, Asquith and Singleton, L.JJ. 28th March, 1950

Appeal from Gloucester County Court.

By s. 89 (1) of the National Insurance (Industrial Injuries) Act, 1946, "Workmen's compensation shall not be payable . . . after the appointed day . . . Provided that—(*a*) the" Workmen's Compensation Acts "shall continue to apply to . . . cases where a right to compensation arises . . . in respect of employment before the appointed day, except where, in the case of" an industrial disease "the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease . . ." The appointed day under the Act of 1946 was 5th July, 1948. On 17th August, 1948, a certifying surgeon gave a certificate under s. 43 of the Workmen's Compensation Act, 1925, that a workman was suffering from an industrial disease and specified the date of disablement as 6th February, 1948. On his application for workmen's compensation under the Act of 1925 the employers took the preliminary objection that the workman's right to compensation arose, if at all, only on the date of the surgeon's certificate, and that as at that date the Act of 1925 had been repealed by s. 89 (1) of the Act of 1946, no such right ever did arise. The county court judge held that on 5th July, 1948, the certifying surgeon became *functus officio* and could thereafter give no certificate under the Act of 1925. It was contended for the workman on appeal that the certifying surgeon's certificate was a mere matter of proof and not a necessary element in the right to compensation and so operated retrospectively to create that right as at the certified date of disablement, and that the fact that the right to compensation thus arose out of employment existing before the appointed day was sufficient to exclude the exception to proviso (*a*) to s. 89 (1) of the Act of 1946.

COHEN, L.J., held that, as the right to compensation did not arise until disability or incapacity, and as under s. 43 of the Act of 1946 there was no right to compensation until the surgeon had given his certificate, and as, when he came to give it, he was *functus officio* under the Act of 1925 because of its repeal by s. 89 (1) of the Act of 1946, the workman's claim to compensation failed *in limine*.

ASQUITH and SINGLETON, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *Beney*, K.C., and *E. Falk* (*W. H. Thompson*); *Lloyd-Jones*, K.C., and *R. F. Lyne* (*Peacock and Goddard*, for *Cartwright, Taylor & Corpe*, Bristol).

Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

## CHANCERY DIVISION

### WILL: OPTION TO ACQUIRE SHARES AT PAR VALUE: COMPANIES AMALGAMATED AND WOUND UP: OPTION TO PURCHASE LAND: INCOMPLETE PURCHASE OF COTTAGES: PURCHASE OR DEVISE

***In re* Fison's Will Trusts; Fison *v.* Fison**

Romer, J. 2nd February, 1950

Adjourned summons.

By his will the testator, who died in 1920, directed his trustees after the death of his widow to offer the shares in two companies to his sons at par value. The widow died in 1949. After the death of the testator, one of the companies was absorbed by way of amalgamation by a third company and, at the date of the widow's death, the trustees held shares of the third company which they had received in exchange for the shares of the absorbed company. The other company had been wound up and the trustees held investments bought with the capital paid to them with respect to the testator's shares, and further a cash balance which remained uninvested. The testator further directed his trustees after the widow's death to offer the X estate to one of his sons at a fixed price; between the date of the will and his death the testator contracted to purchase seven cottages at X, but the contract had not been carried to completion at the time of his death. The X estate was charged with certain charges

or incumbrances. On the widow's death the son had exercised the option to purchase the property.

ROMER, J., said that, upon the proper construction of the will, the direction with regard to the purchase of shares "at par value" had to be interpreted as meaning the par value of the shares at the time the testator died. The gift had the same effect as though there were substituted for the words in the will the words "the sum which the shares in the aggregate were worth at par at the time of my death." The options of the sons were, therefore, still exercisable after the death of the widow, and operated, as regards the one company, on the shares of the company which had absorbed the relevant company by amalgamation, and, as regards the other wound-up, company, on the investments and cash representing the amount received by the trustees on the liquidation of the company. As regards the X estate, the subject-matter of the son's option included the seven cottages, and the position in that regard was the same as though the cottages had actually been conveyed to the testator before his death (*In re Wakefield* (1943), 87 SOL. J. 371). Further, the son was entitled to the option to purchase the X estate as a purchaser, and not as an heir or devisee, and therefore the Real Estate Charges Act, 1854 (Locke King's Act), s. 1, did not apply, and the son, who had exercised the option, was entitled to the conveyance of the estate free from any incumbrances; *In re Wilson*; *Wilson* v. *Wilson* [1908] 1 Ch. 839 followed.

APPEARANCES: *Droop, J. A. Reid* (*Wrinch & Fisher*, for *Block & Cullingham*, Ipswich); *Lightman* (*Torr & Co.*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

## WILL: GIFT TO ANTI-VIVISECTION SOCIETY: PERPETUITY: FUTURE OR CONTINGENT GIFT

### *In re* Wightwick's Will Trusts; Official Trustees of Charitable Funds *v.* Fielding-Ould

Wynn Parry, J. 2nd March, 1950

Adjourned summons.

The testatrix gave £2,000 to her trustees and directed them to invest the money and to pay the income to the International Association for the Total Suppression of Vivisection, "such dividends to be at the disposal of the committee for the time being for the purposes of the said Association until the time shall arrive that the practice of vivisection be made penal by law within the United Kingdom of Great Britain and Ireland and shall also be made a punishable offence upon the continent of Europe and elsewhere," and when these aims were attained, to pay the income of the fund to the Royal Society for the Prevention of Cruelty to Animals; the residuary estate was given to another person. The trustees paid the income to the International Association for the Total Suppression of Vivisection and its successor, the National Anti-Vivisection Society, as directed, but in 1947 the House of Lords decided in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] A.C. 31 that the purposes of an anti-vivisection society were not charitable in the legal sense.

WYNN PARRY, J., in a considered judgment, said that the first question was to decide whether the primary gift, viz., the gift to the National Anti-Vivisection Society, was valid. That it was a gift for an indefinite period was not of itself an objection and, *prima facie*, it would be good unless it infringed the rule against inalienability (*In re Chardon*; *Johnston* v. *Darver* [1928] Ch. 464). But the present case was distinguishable from *In re Chardon* in so far as in the present case the will provided that the income was to be at the disposal of the committee for the time being for the purposes of the association. This was a trust of income for an indefinite period for a purpose not being charitable which involved rendering the capital inalienable, and that gift was void as a perpetuity. The gift over was likewise invalid because it was contingent; the test was whether or not the gift over was bound to take effect. There was no *dies certus* here, as, e.g., the death of a person, when it was certain that the primary gift would terminate and the gift over take effect. Cases where, on the failure of the primary gift, the property fell into residue stood on a different footing. It followed that the investments in question now held by the trustees fell into the residuary estate. The trustees when paying the income to the primary beneficiary, had acted on the generally held view that the purposes of the association were charitable and had acted throughout *bona fide*. Relief under the Trustee Act, 1925, s. 61, would therefore be granted with respect to their personal liability.

APPEARANCES: *Newsom* and *Denys B. Buckley* (*Treasury Solicitor*); *Pascoe Hayward*, K.C., and *Mendel* (*Shield & Son*); *Ian Campbell* (*Vizard, Oldham, Crowder & Cash*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

## WILL: PARTIAL LAPSE: INCIDENCE OF LEGACIES

### *In re* Beaumont's Will Trusts; Walker *v.* Lawson

Danckwerts, J. 16th March, 1950

Adjourned summons.

The testatrix, Mrs. B, after giving specific and pecuniary legacies, devised and bequeathed her residuary estate in trust to divide the same, after payment of funeral and testamentary expenses and debts, between four named legatees. In August, 1948, the testatrix died, leaving her husband surviving her, but no issue, and having been predeceased by one of the four legatees, B L. Two of the remaining legatees died before the hearing of the summons. The question raised was whether the debts, funeral and testamentary expenses and pecuniary legacies given by the will ought to be paid out of the whole estate before division, or whether they should be borne by the lapsed share of residue given to B L.

DANCKWERTS, J., said that, as was contended by counsel for the husband of the testatrix, no provision had been made in s. 34 of the Administration of Estates Act, 1925, with regard to legacies. Debts and funeral and testamentary expenses undoubtedly came out of the whole residue before division as the will said so, but the position of legacies depended on the old law before the Act of 1925, unless something in that Act demonstrably modified it. In *In re Thompson* [1936] Ch. 676, Clauson, J., held that the old law laid down in *In re Boards* [1895] 1 Ch. 499, still remained operative so as to cast the burden of legacies on the personal estate. In the present case, therefore, the pecuniary and specific legacies and the duty thereon were all payable out of the whole estate before division into four equal parts, so that the lapsed share was simply a lapsed share of the estate after those burdens had been shared. With regard to the estate of one of the residuary legatees who had died shortly before the hearing of the summons, an order would be made under Ord. 16, r. 46, giving leave to proceed in the absence of any personal representative.

APPEARANCES: *J. A. Armstrong* (*Peacock & Goddard*, for *Johnstone, Williams & Walker*, Nottingham); *W. A. Bagnall* (*Collyer-Bristow & Co.*, for *Wilkins & Thompson*, Uttoxeter); *E. M. Winterbotham* (*Sharpe, Pritchard & Co.*, for *Rendall, Litchfield & Co.*, Bournemouth).

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

## HOSPITAL: ACCOMMODATION FOR PATIENTS' RELATIONS: CHARITY

### *In re* Deans' Will Trusts; Cowan *v.* St. Mary's Hospital, Paddington

Harman, J. 28th March, 1950

Adjourned summons.

The testator Deans, by a will made in 1947, gave his residue valued at about £40,000 to the governors of St. Mary's Hospital, Paddington, and directed that they were to apply it in the first place in providing accommodation for the relatives, coming from a distance, of patients who were critically ill, and subject thereto for the assistance of the work of the

almoners, and any money not so required was to be used for purposes of the hospital, other than general administration. The question was raised whether there was a valid charitable gift. The next of kin contended that it exceeded the limits of charity. There was evidence that it was frequently the duty of an almoner to find accommodation for relatives of a patient, and it was not disputed that the work of an almoner was charitable.

HARMAN, J., having stated the provisions of the will, said that the testator died before the appointed day, 5th July, 1948, the vesting day under the National Health Service Act, 1946, and therefore the gift vested in the governors of the hospital, who were a chartered corporation. He had no doubt that the testator was trying to provide for that which he thought might come about under the National Health Service Act. The case was a simple one. The testator had made the gift to the hospital not for general maintenance but for two other purposes—one for almoners, the other for the accommodation of relatives of patients critically ill. Those were purposes of the hospital, and the latter might be a very important purpose from the psychological point of view, as the knowledge that relatives might be able to come to see them might aid the recovery of patients *in extremis*, even though the relatives might never see the patient. It was a purpose of the hospital which had been carried out by the almoners. In his opinion the gift constituted a valid charitable gift to the hospital.

APPEARANCES: *R. W. Goff* (*Murray, Hutchins & Co.*); *Ungoed-Thomas*, K.C., and *Nigel Warren* (*Beachcroft & Co.*), *Neville Gray*, K.C., and *G. A. Rink* (*Cree, Godfrey & Wood*); *Denys Buckley* (*Treasury Solicitor*).

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

# SURVEY OF THE WEEK

## HOUSE OF LORDS

### A. PROGRESS OF BILLS

Read First Time :—

**Army and Air Force (Annual) Bill [H.C.]** [4th April.
**Diplomatic Privileges (Extension) Bill [H.C.]** [4th April.
**High Court and County Court Judges Bill [H.L.]** [5th April.

To provide for increasing the number of puisne judges of the High Court and the number of judges of county courts.

**Post Office and Telegraph (Money) Bill [H.C.]** [4th April.
**Public Registers and Records (Scotland) Bill [H.L.]** [4th April.

To amend the law of Scotland with regard to the signing of certificates of recording in the Register of Sasines.

Read Second Time :—

Dundee Corporation (Administration and General Powers) Order Confirmation Bill [H.C.] [4th April.
**Maintenance Orders Bill [H.L.]** [4th April.

Read Third Time :—

German Potash Syndicate Loan Bill [H.L.] [5th April.
Gun Barrel Proof Bill [H.L.] [5th April.
**Midwives (Amendment) Bill [H.L.]** [5th April.
**Newfoundland (Consequential Provisions) Bill [H.L.]** [5th April.
St. John's Chapel Beverley Bill [H.L.] [5th April.
Tees Conservancy Bill [H.L.] [5th April.
Wear Navigation and Sunderland Dock Bill [H.L.] [5th April.

### B. DEBATES

On the Second Reading of the **Maintenance Orders Bill,** the LORD CHANCELLOR said that the Bill dealt with three types of orders—namely, wife maintenance orders, affiliation orders, and orders for the maintenance of infants under the Guardianship of Infants Act. The Bill concerned England, Scotland and Northern Ireland, and the existing law was different in each of those three countries.

In Scotland, the law was the same in every kind of case—the court which had jurisdiction was the court in the district where the defender resided, and no other court. In England, in wife maintenance cases, the court could be either that in whose jurisdiction the matrimonial offence had been committed, or, by recent enactment, the court where either the wife or the husband resided. In affiliation cases, it was the court in whose area the mother resided. In guardianship of infants cases the Acts were silent on the question of jurisdiction. In all types of cases, the English courts had no jurisdiction if the husband or father were outside the country, e.g., in Scotland. In Northern Ireland the position was much the same as in England, except that they had nothing similar to our guardianship of infants jurisdiction.

So far as enforcement of an order once made was concerned, the position in all three countries was that where the man had moved out of the country in which the order had been made, there was no practical method of enforcing it against him.

The Bill consisted of two parts: Pt. I related to the jurisdiction of courts of summary jurisdiction in England and Northern Ireland, and of sheriff courts in Scotland, to make and vary orders. Part II related to the enforcement of orders, and applied also to orders of superior courts. Part I dealt with wife maintenance orders, guardianship of infants orders, affiliation orders and certain analogous orders which could be made on the application of the National Assistance Board or a local authority.

The nature of the extension of jurisdiction differed as between England and Northern Ireland on the one hand, and Scotland on the other hand. The Bill extended the jurisdiction of the Scottish courts by conferring jurisdiction on the court of the woman's residence in those cases where the defender was resident in England or Northern Ireland. With respect to England and Northern Ireland, the effect of the Bill was to give jurisdiction in such cases to whatever court would have had jurisdiction if the defendant had been in one or other of those countries. The right to exercise the jurisdiction conferred by the Bill was subject to the general condition that the cause of action, for example, failure to maintain a wife, or intercourse in an affiliation case, must have occurred in that part of the United Kingdom in which the court exercising the jurisdiction was situated. The jurisdiction conferred by the Bill was in addition to, and not in derogation of, any jurisdiction otherwise exercisable.

There were four classes of orders which could be made under the existing law on the application of the National Assistance Board or a local authority. The first class were really affiliation orders, made on the application, not of the mother, but of the authority who were spending money on the maintenance of the illegitimate child. The second class were orders directing that sums payable under existing affiliation orders to the mother be diverted to a local authority. Thirdly, there were orders obtainable at the instance of a local authority against persons who, under the Children and Young Persons Act, were liable to contribute to the maintenance of a child or young person who was being looked after by a local authority. Lastly, there were the orders which could be made for the benefit of the National Assistance Board, or of a local authority, when they were maintaining a person other than an illegitimate child—for example a separated wife—for whose support the defendant was legally liable.

In all such cases the Bill put the Board or the local authority in a position to obtain and enforce orders when the defendant was in another part of the United Kingdom.

The Bill contained special provisions as to the service of summonses. When the defendant was *not* resident in the country in which the proceedings had been brought, the procedure would be that a summons issued in that country might be endorsed and served in the country of the defendant's residence. Service would have to be personal. If the defendant failed to appear, an order could be made against him in his absence provided that service was properly proved. So far as England and Scotland were concerned provision was made for the transference of proceedings in wife maintenance cases, on the defendant's request, from one court to another court in the same country if the last matrimonial home of the parties was within the jurisdiction of the latter court.

Part II of the Bill covered the same general type of orders as Pt. I, but applied to superior as well as inferior courts. The Bill provided for an order made in one part of the United Kingdom being registered and enforced in the part in which the defendant

was residing as if it had been made in that part. Advantage had been taken under the Bill of the existence of collecting officers in summary courts in England and Northern Ireland for the collecting of money due under orders, and for assisting women in the registration and enforcement of orders in a court other than that in which they had been made. Special provision had also been made for the variation and revocation of orders. In the superior courts the Bill adhered to the principle that an order could be varied only by the court which had made it. In order, however, to save expense and inconvenience to the parties the procedure had been facilitated by enabling a court in another country to take the evidence of the person liable to make payments under the order and to send a transcript thereof to the court which had made the order. In courts of summary jurisdiction and sheriffs' courts the strict principle had been relaxed—but only as regards variation of the amount payable.

He commended the Bill to the House as being one that remedied a real hardship and would bring long-needed relief to many unfortunate women. [4th April.

## HOUSE OF COMMONS

### A. Progress of Bills

Read First Time :—

**Coal Mining (Subsidence) Bill [H.C.]** [5th April.

To provide for the carrying out of repairs and the making of payments in respect of damage affecting certain dwelling-houses and caused by subsidence resulting from the working and getting of coal and other minerals worked with coal, and for the execution of works to prevent or reduce such damage; and for purposes connected with the matters aforesaid.

**Merchant Shipping Bill [H.C.]** [31st March.

To provide for regulating crew accommodation in fishing boats and for amending the Merchant Shipping Acts, 1894 to 1949, with respect to the engagement and discharge of crews, the review of punishments imposed by naval courts, fishing boats engaged in the Newfoundland cod fisheries, and proceedings in summary courts in Northern Ireland; and for purposes connected with the matters aforesaid.

**Royal Patriotic Fund Corporation Bill [H.C.]** [4th April.

To make further provision as respects the application of certain funds under the management of the Royal Patriotic Fund Corporation.

Read Second Time :—

Bootle Extension Bill [H.C.] [5th April.
**Distribution of Industry Bill [H.C.]** [4th April.
London County Council (General Powers) Bill [H.C.] [3rd April.
Oldham Extension Bill [H.C.] [4th April.
South Shields Extension Bill [H.C.] [5th April.
Sunderland Extension Bill [H.C.] [5th April.
Thames Conservancy Bill [H.C.] [4th April.
Wolverhampton Corporation Bill [H.C.] [5th April.

### B. Questions

In reply to a question as to whether he would prevent or limit the possession of firearms by ordinary citizens, Mr. Chuter Ede said it was an offence under the Firearms Act, 1937, punishable by severe penalties, to be in possession of a firearm except in accordance with the terms of a firearms certificate issued by the appropriate chief officer of police. Before issuing such a certificate the chief officer was required to satisfy himself that the applicant had good reason for being in possession of a firearm and could be permitted to have one without danger to the public safety or to the peace. [30th March.

Mr. Bevan stated that the legislation making illegal the charging of premiums for rent-controlled houses and flats was comprehensive and he hoped that no addition thereto was required. [30th March.

Mr. Barnes said, with regard to controlled pedestrian crossings, that existing regulations gave priority to a pedestrian who had started to cross before traffic had been permitted by a signal to proceed over the crossing. When the crossing was not controlled by lights, the pedestrian had the right of way. [3rd April.

## STATUTORY INSTRUMENTS

**Argyll** County Council (Allt a'Charaidh) Water Order, 1950. (S.I. 1950 No. 462.)
**Byssinosis** (Benefit) Scheme (Modification) Regulations, 1950. (S.I. 1950 No. 476.)
**Calf Rearing** (England, Wales and Northern Ireland) (Amendment) Scheme, 1950. (S.I. 1950 No. 477.)
**Dried Fruits** (Amendment) Order, 1950. (S.I. 1950 No. 473.)
**Fire Services** (Transfer of Pension Assets) Regulations, 1950. (S.I. 1950 No. 468.)
**Firemen's Pension Scheme** Order, 1950. (S.I. 1950 No. 467.)
**Gloves** (Manufacture and Supply) (Amendment No. 4) Order, 1950. (S.I. 1950 No. 446.)
**Household Textiles** (Marking and Manufacturers' Prices) (Amendment No. 2) Order, 1950. (S.I. 1950 No. 451.)
**Importation of Raw Cherries** Order, 1950. (S.I. 1950 No. 469.)
Importation of Raw Cherries (Scotland) Order, 1950. (S.I. 1950 No. 482.)
**Income Tax** (Employments) Regulations, 1950. (S.I. 1950 No. 453.)
**Kitchen Waste** and Salvage of Waste Materials (Revocation) Order, 1950. (S.I. 1950 No. 499.)
Kitchen Waste Order, 1950. (S.I. 1950 No. 505.)
**Land Drainage** (Grants to Catchment Boards) Regulations, 1950. (S.I. 1950 No. 478.)
**London Traffic** (Parking Places) (Amendment) Regulations, 1950. (S.I. 1950 No. 490.)
London Traffic (Prescribed Routes) (No. 5) Regulations, 1950. (S.I. 1950 No. 489.)
London Traffic (Restriction of Waiting) (Watford) Regulations, 1950. (S.I. 1950 No. 491.)
**National Health Service** (General Medical and Pharmaceutical Services) (Scotland) Amendment Regulations, 1950. (S.I. 1950 No. 465.)
National Health Service (Joint Pricing Committee for England) (Amendment) Order, 1950. (S.I. 1950 No. 486.)
**Oats** (Great Britain and Northern Ireland) (Amendment) Order, 1950. (S.I. 1950 No. 474.)
**Police** (Overseas Service) (British Element Trieste Force) Regulations, 1950. (S.I. 1950 No. 495.)
*Draft* **Police Pensions** (Scotland) Regulations, 1950.
**Proprietary Infant Milk Foods** (Revocation) Order, 1950. (S.I. 1950 No. 487.)
**Safeguarding of Industries** (Exemption) (No. 4) Order, 1950. (S.I. 1950 No. 460.)
**Stopping up of Highways** (Devonshire) (No. 3) Order, 1950. (S.I. 1950 No. 485.)
Stopping up of Highways (Essex) (No. 1) Order, 1950. (S.I. 1950 No. 484.)
Stopping up of Highways (London) (No. 3) Order, 1950. (S.I. 1950 No. 483.)
**Superannuation** (Teaching and Health Education) Rules, 1950. (S.I. 1950 No. 479.)
**Supplemental Allowances** (Scottish Scholars at English Universities) (Amendment No. 1) Regulations, 1950. (S.I. 1950 No. 466.)
*Draft* **Teachers' Superannuation** (Foreign Office (German Section)) Amending Scheme, 1950.
**Timber** (Charges) (No. 11) Order, 1950. (S.I. 1950 No. 472.)
**Trading with the Enemy** (Custodian) Order, 1950. (S.I. 1950 No. 494.)
**Upholstery Cloth** (Utility) (Amendment No. 5) Order, 1950. (S.I. 1950 No. 448.)
**Utility Apparel** (Maximum Prices and Charges) Order, 1949 (Amendment No. 6) Order, 1950. (S.I. 1950 No. 397.)
Utility Apparel (Men's, Youths' and Boys' Outerwear) (Manufacture and Supply) Order, 1950. (S.I. 1950 No. 445.)
**Utility Curtain Cloth** (Amendment No. 2) Order, 1950. (S.I. 1950 No. 449.)
**Utility Woven Cloth** (Cotton, Rayon and Linen) (Amendment) Order, 1950. (S.I. 1950 No. 450.)
**Wath-upon-Dearne** (Conservation of Water) Order, 1949. (S.I. 1950 No. 459.)
**Wild Birds** Protection (County of Inverness) No. 2 Order, 1950. (S.I. 1950 No. 461.)

---

The King has appointed Mr. H. B. H. Hylton-Foster, K.C., M.P., to be Recorder of Kingston-upon-Hull in succession to Mr. C. B. Fenwick, K.C., who has been appointed a county court judge.

Mr. Frank England, for many years assistant solicitor to the Inland Revenue and a Special Commissioner of Income Tax, has been appointed legal adviser to the Income Tax Payers' Society.

# NOTES AND NEWS

### Honours and Appointments

The King has appointed Mr. H. R. B. SHEPHERD to be Recorder of York in succession to Mr. G. W. Wrangham, who has been appointed a county court judge.

The King has approved, on the recommendation of the Lord Chancellor, the appointment of sixteen new King's Counsel. The new K.C.'s are: ARTHUR EDGAR JALLAND, WILLIAM LATEY, GEOFFREY GLYNN BLACKLEDGE, SEYMOUR GONNE VESEY-FITZGERALD, DR. CONSTANTINE JOHN COLOMBOS, CYRIL PEARCE HARVEY, STEPHEN GERALD HOWARD, RICHARD EVERARD AUGUSTINE ELWES, JAMES GONVILLE STRANGMAN, JOHN GALWAY FOSTER, HAROLD RICHARD BOWMAN SHEPHERD, DAVID KARMEL, GEOFFREY LAWRENCE, ROY MICKEL WILSON, BERNARD JOSEPH MAXWELL MACKENNA and GEOFFREY HENRY CECIL BING.

The Law Officers' Department states that the announcement of Mr. E. I. Goulding's appointment as conveyancing counsel to the Treasury and War Office in succession to Mr. Wilfred Gutch was published in error. Mr. Goulding was offered the appointment, but felt unable to accept it. The Attorney-General has, therefore, appointed Mr. E. J. T. G. BAGSHAWE in succession to Mr. Gutch.

Mr. B. R. OSTLER, deputy town clerk of Harrogate, has been appointed clerk and solicitor to Friern Barnet Urban District Council.

### Personal Notes

On his completion of fifty years' service with Messrs. Bell, Pope and Bridgwater, of Southampton, Mr. C. A. Fudge was recently presented with a cheque by the firm and a pair of silver-backed hairbrushes by the staff.

Believed to be the oldest magistrate in the country on the active list, Mr. J. Allon Tucker, solicitor, aged ninety-four, recently celebrated fifty years' service on the Bath bench.

### Miscellaneous

#### RENT TRIBUNALS

The members of the new Wolverhampton Rent Tribunal, set up by the Minister of Health on 11th March, are: Chairman, Mr. A. Darbey; Member and Reserve Chairman, Mr. T. Griffiths; Member, Mr. H. Busill Jones; Reserve Members, Mr. G. G. Evans, Mr. H. Hardwick, Mrs. E. M. Tongue, Mr. A. Hampton, Mr. H. Smith and Mr. W. G. Ratcliffe. The new tribunal has taken over the areas formerly covered by the old Wolverhampton Tribunal and by the Walsall Tribunal, both of which have been dissolved. Its offices will be situated in Castle Street, Wolverhampton.

The offices of the rent tribunal for Harrow, Hendon, Wembley and Willesden are now at 181 Cricklewood Broadway, Cricklewood, N.W.2 (Telephone: Gladstone 0672–3).

#### DOUBLE TAXATION—DENMARK

A Double Taxation Convention between the United Kingdom and Denmark was signed in London, on 27th March. The convention, which is subject to ratification, provides for avoidance of double taxation on income and profits and is expressed to take effect in the United Kingdom from 6th April, 1949. The convention is in general similar to those already made with the United States of America, certain Commonwealth countries, the Netherlands, Sweden and Burma.

We are grateful to a correspondent for pointing out that the date of commencement of the Adoption of Children Act, 1949, was 1st January, 1950, and not 16th December, 1949, as stated in the first paragraph of the article on p. 173, *ante*.

## SOCIETIES

At the annual meeting of the CARDIFF AND DISTRICT INCORPORATED LAW SOCIETY, held at the Law Courts, Cardiff, on 31st March, Mr. Ewan G. Davies was elected President, Mr. C. James Hardwicke Vice-President, Mr. Richard O. Rhys Hon. Treasurer and Mr. Leslie Shepherd Hon. Secretary.

The ISLE OF WIGHT LAW SOCIETY held its annual general meeting on 2nd March, at the Town Hall, Ryde, and the following appointments of officers were made: President, Mr. H. W. Lyne; Vice-President, Mr. F. W. H. Cool; Hon. Treasurer, Mr. V. Howell; Hon. Secretary, Mr. E. A. McCullagh. The meeting was preceded by lunch at The Galleon, Ryde, and the members were subsequently entertained to tea by the retiring President, Mr. R. E. A. Webster.

The sixty-second annual general meeting of the MONMOUTHSHIRE INCORPORATED LAW SOCIETY was held at the Law Library, Newport, on 31st March, when the annual report of the council was presented. Mr. Richard Basset Spencer was elected President for the ensuing year, Mr. F. Taynton Evans and Mr. G. Roy Jenkins Vice-Presidents, Mr. J. Kenneth Wood Hon. Treasurer, Mr. S. M. T. Burpitt Hon. Librarian and Mr. W. Pitt Lewis Hon. Secretary. The following were elected members of the council: Messrs. F. H. Dauncey, J. Owen Davis, Joshua Dawson, D. W. Evans, E. I. P. Bowen, S. P. Gunn, Mostyn C. Llewellin, G. Roy Jenkins, Trevor C. Griffiths, G. L. B. Francis and Rowland J. Rowlands.

At the seventy-fifth annual meeting of the SHEFFIELD DISTRICT INCORPORATED LAW SOCIETY Mr. R. Meeke was elected President, Mr. W. A. Lambert Vice-President, Mr. R. T. Wilson Hon. Treasurer and Mr. J. Renwick Hon. Secretary.

At the annual meeting of the SWANSEA AND DISTRICT INCORPORATED LAW SOCIETY on 29th March, Mr. Arthur Lloyd was elected President, Mr. G. A. Thomas Vice President, Mr. W. R. Francis Hon. Treasurer and Mr. Edward R. Nash Hon. Secretary. The following new members were elected to the committee: Mr. Vaughan Edwards-Jones, Mr. G. B. Mendus and Mr. David Thomas.

#### UNITED LAW CLERKS' SOCIETY

##### 118TH ANNIVERSARY FESTIVAL

The Rt. Hon. Lord Morton presided at the Society's anniversary dinner at the Connaught Rooms on Monday, 13th March. There was an attendance of members and others of over 360 persons, and the company included the Master of the Rolls, Sir Raymond Evershed, Lords Justices Bucknill and Cohen, Mr. Justice Harman, and many well-known members of the Bar and of the solicitors' branch of the profession. Lady Morton accompanied the chairman, and many ladies were present.

After the loyal toasts, Lord Morton of Henryton, proposing the toast of "The Society," emphasised the fact that friendly societies, in the carrying out of their original and principal function, the voluntary provision of benefit in times of sickness and old age, are in no way affected by the National Insurance Acts. The Hon. Treasurer responded.

The toast of "The Legal Profession" was proposed by Mr. Edward Jagôt, chairman of the committee of management, and it was responded to by Mr. G. Russell Vick, K.C., chairman of the General Council of the Bar, and by Mr. H. Nevil Smart, C.M.G., O.B.E., J.P., President of The Law Society. Mr. Nevil Smart, in the course of his reply, said, "There is one thing which will affect you all very shortly, and that is the Legal Aid and Advice Act. My branch of the profession, with the aid of counsel and members of the Bar, have been entrusted—I think that it is the first time that a profession has been entrusted—with the running of an Act of Parliament and the spending of the money in order to give service to the public. It is a very big service, because roughly half of the population will get assistance in the High Court, and later on, when the economic position of the country becomes better, that will extend to county courts and there will be advice as well. That is being deferred for the time being. This throws a great responsibility upon us. The replies that I have had from all over the country when we have asked solicitors whether they would help have been most encouraging. I think that we shall be able to make the Act a success."

"THE SOLICITORS' JOURNAL"

*Editorial, Publishing and Advertising Offices:* 88-90, Chancery Lane, London, W.C.2. Telephone: Holborn 1403.

*Annual Subscription:* £3 inclusive (payable yearly, half-yearly or quarterly in advance).

*Advertisements* must be received first post Tuesday.

*Contributions* are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).